IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

JAMES H. GRAY, as Chairman of the Georgia State Democratic Executive Committee;
GEORGE D. STEWART, as Secretary of the Georgia State Democratic Executive Committee;
THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE;
THE GEORGIA STATE DEMOCRATIC PARTY, and
BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellants,

vs.

JAMES O'HEAR SANDERS,
Appellee.

Appeal from United States District Court for the Northern District of Georgia, Atlanta Division.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this court, James H. Gray, et al., Appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the interlocutory injunction issued by a special three-judge court, convened pursuant to 28 U. S. C. A. 2281, enjoining appellants (defendants below), including appellant Fortson, who is Secretary of State of the State of Georgia, from enforcing and giving effect

to certain statutes of the State of Georgia, requiring that primary elections conducted by political parties be held pursuant to the county unit method.

OPINIONS BELOW.

The opinion of the special three-judge federal court, rendered April 28, 1962, is not yet reported. Said opinion and the interlocutory decree issued therewith are appended hereto as "Appendix A".

BASIS OF JURISDICTION.

I.

This case is an action brought by appellee, a resident of Fulton County, Georgia, against the Democratic party of Georgia and certain of its officials, and Ben W. Fortson, Jr., Secretary of State of Georgia, attacking the constitutionality under the Fourteenth and Seventeenth Amendments to the Constitution, of statutes of the State of Georgia, Code Ann., Sections 34-3212 through 34-3218, as amended. These statutes provide that any political party conducting a primary election for nomination of candidates for United States Senator, Governor and other state house offices, consolidate and tabulate the votes cast therein according to the "county unit" method. The court below held the statutes in their present form to be unconstitutional as effectuating an invidious discrimination against plaintiff and other voters residing in the more populous counties of the state.

II.

Interlocutory injunction was rendered by the District Court on April 28, 1962. Notice of appeal was filed in said court on May 1, 1962.

III.

The jurisdiction of this court to review on appeal the interlocutory injunction rendered by the District Court is conferred by 28 U. S. C. A., Sections 1253, 2281, 2284.

IV.

Cases which sustain the jurisdiction of this court to review on direct appeal the final judgment of the special three-judge district court are: **Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.**, 292 U. S. 386, 78 L. Ed. 1318 (1934); **Palmetto Fire Ins. Co. v. Conn**, 272 U. S. 295, 305, 71 L. Ed. 243 (1926); **Hays v. Port of Seattle**, 251 U. S. 233, 64 L. Ed. 243 (1920).

V.

The Georgia statutes, the validity of which are drawn in question in this case, are Georgia Code Ann., Sections 34-3212 through 34-3218, inclusive, particularly Sections 34-3212 and 34-3213, as amended by an act approved April 27, 1962 (Ga. Laws 1962, Ex. Sess., p. ...). These statutes are set forth in "Appendix B".

QUESTIONS PRESENTED.

1. Whether a county unit method of conducting primary elections for nomination of candidates for Governor, United States Senator and other state house offices, in force by custom and practice for over 100 years, and by statute for 45 years, is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether said statutes, as applied to primary elections conducted by political parties for nomination of candidates for United States Senator, violate the Seven-

teenth Amendment to the Constitution of the United States, requiring that elections for Senator be "by the people".

3. Whether the constitutional adjudication here was premature in view of the fact that on the same day that the case was heard, an amendment to the statute under attack was enacted which required that in any event before a candidate could be declared the nominee of the party as a result of the first primary, he must not only receive a majority of county unit votes, but also a majority of all popular votes cast, failing whereof a run-off primary would be conducted between the candidates receiving the highest unit vote and popular vote, respectively.

4. Whether the court below erred in granting an interlocutory injunction against enforcement of the state statutes in question.

5. Whether the court below erred in refusing to dismiss the complaint on motion by defendants.

6. Whether a state, consistently with the Fourteenth and Seventeenth Amendments, and in view of the fact that final election is by popular vote, may insure an adequate diffusion of electoral power so as to achieve a reasonable balance between rural and urban areas, by requiring that primary elections conducted by political parties be conducted and the votes cast therein be consolidated and tabulated according to the county unit method, whereby each county is assigned a prescribed number of unit votes, to be received by the candidate receiving a plurality of popular votes cast in each such county, the unit votes being allocated among the counties according to population pursuant to a bracket system gradnated with each succeeding higher population bracket.

STATEMENT OF THE CASE.

This case is an appeal by the Democratic Party of Georgia and its designated officials, and the Secretary of State of Georgia, from an interlocutory injunction rendered by a special three-judge district court, declaring unconstitutional in part certain Georgia statutes[1] governing conduct of primary elections, and enjoining said officials from enforcing and giving effect to said statutes in the state-wide primary set by law[2] to be held on September 12, 1962, for nomination of candidates for Governor, United States Senator, and various state-house offices. The General Election is to be held on the Tuesday after the first Monday in November, 1962.[3]

On March 26, 1962, the same date of this court's decision in **Baker v. Carr**, 369 U. S. 186, plaintiff, appellee herein, filed complaint in the District Court for the Northern District of Georgia, alleging that he was a citizen and registered voter in Fulton County, Georgia, the state's most populous county; that he plans to vote in the Democratic primary on September 12, 1962; that defendant party and its officials are undertaking to conduct said primary in accordance with the "county unit" method as prescribed by statute; that defendant Fortson as Secretary of State will certify the names of the Democratic nominees so chosen to the several ordinaries for insertion on the general election ballot; and that said statutes are violative of plaintiff's rights under the Fourteenth and Seventeenth Amendments to the Constitution of the United States. Various allegations are made undertaking to

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[1] Ga. Code Ann., Sections 34-3212 through 34-3218, as amended, set forth in Appendix B.

[2] Ga. Laws 1962, p. 15.

[3] Ga. Constitution, Art. III, Sec. IV, Par. II; Art. V, Sec. I, Par. II.

demonstrate the manner in which it is alleged said statutes discriminate against voters in the more populous counties. Interlocutory and permanent injunction, declaratory judgment and convening of a special three-judge court were prayed.

A special three-judge court was convened, and the matter came on for hearing on April 27, 1962, defendants having filed answer and motion to dismiss.

In the meantime, the General Assembly of Georgia had met in extraordinary Session on April 16, to consider legislative reapportionment and revision of the statutes governing primary elections. This Session culminated on April 27, with an amendment materially altering the very statutes attacked in the complaint, the amendment having been enacted and signed into law while arguments before the court below were in progress.

Georgia law does not require that nominations by political parties be by primary. The statutes under attack do provide, however, that if a primary is held, the votes cast therein must be consolidated and tabulated according to the "county unit" method, under which each county is assigned a certain number of unit votes. The candidate for any given office receiving a plurality of popular votes in any county is deemed to have carried such county, and is entitled to the full unit vote of such county. With respect to Governor and United States Senator, the candidate receiving a majority of the county unit votes over the entire state is entitled to receive the nomination. With respect to other state house offices, only a plurality is required.[4] The unit votes allocated to each of the state's 159 counties were allocated on the basis of the representation accorded each county in the House of Representatives

[4] Ga. Code Ann. 1961 Cum. Pocket Part, Sec. 34-3212. The 1962 amendment now requires a majority as to all offices affected thereby, and not just Governor and Senator.

of the General Assembly, each county receiving 2 unit votes for each member of the House.[5]

Such was the state of the law when the complaint was filed. However, as previously noted, the law was amended by the General Assembly while the case was being argued. The effect of this amendment was to raise the total unit vote from 410 to 547, and to accord the larger counties substantially more unit strength. For example, Fulton County was raised from six to forty units. Under the 1962 amendment, unit votes were no longer tied to representation in the House of Representatives, but a bracket system was prescribed which gradually reduced the percentage of unit votes per given number of persons in each succeeding larger population bracket.

Another very substantial change was made in the law. In order to be elected at the first primary, the law as amended required that a candidate receive not only a majority of unit votes, but also a majority of popular votes. If any candidate failed to so do, a second or run-off primary was required to be held between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes.[6] The candidate receiving the highest number of unit votes in

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[5] There are 205 members of the House of Representatives, thereby resulting in 410 unit votes prior to the 1962 amendment. These 205 representatives are apportioned by the Constitution as follows: To the eight most populous counties, three representatives each; to the thirty counties having the next largest counties, two representatives each, and to the remaining 121 counties, one representative each. Ga. Const., Art. III, Sec. III, Par. I. This apportionment is required to be changed every ten years within the limits of the above formula. Id., Par. II, and unlike the situation in *Baker v. Carr*, this course uniformly has been followed. See, e. g., Ga. Laws 1961, p. 111.

[6] In the event one candidate received both the highest unit vote and the highest popular vote, the law specifies that he runs in the second primary against the candidate receiving the next highest popular vote.

the second primary prevails. Code Ann., Section 34-3212, 34-3213, as amended (Ga. Laws 1962, Ex. Sess., p. ...).

The district court below was advised of passage and approval of this amendment during oral arguments, whereupon defendants moved for dismissal on the grounds that the case was thereby rendered moot; that the constitutional challenge to the statutes was premature, and would not be ripe for determination until a situation arose requiring a run-over.[7] This motion was overruled.

On the day following arguments, the court rendered decision declaring the statutes unconstitutional in their present form, and granting interlocutory injunction against their enforcement. The court did not invalidate the county unit system *per se*. It held that as presently constituted, the statute effectuated an invidious discrimination in failing to accord the more populous counties a larger percentage of the unit vote.[8]

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[7] Because of the urgency of the issues involved and the imminency of the September primary, the transcript of proceedings, containing argument almost exclusively, was not designated to be sent up. However, the parties stipulated that such matters might be referred to on appeal. See notice of appeal, "Stipulation as to Designation of Record on Appeal".

[8] Plaintiffs' contentions below were three-fold: (1) The statutes deny equal protection because of "reversal" of the vote of a voter in any county casting his vote for a candidate who did not receive a plurality of popular votes in that county; (2) The statutes deny equal protection because of "dilution" of the votes in the more populous counties as compared to the smaller counties. In this respect, plaintiff contended alternatively that (a) *any* dilution was constitutionally impermissible, and (b) in any event, the disparity here was so great as to be "invidious"; (3) The statutes violate the Seventeenth Amendment requiring that senators be "elected by the people".

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The effect of the decision below is to strike down a system of primary elections in effect in Georgia by custom and practice for more than 100 years, and by statute for over 40 years.[9] A primary election is imminent, required by law to be held on September 12.

Unless this court acts without delay to consider the issue on the merits, a primary election for Governor, United States Senator, and all other state house offices will be held contrary to the express wishes of the law-making power of a state. This radical departure will emanate from a federal court decree the correctness of which may never be determined simply because events transpiring under and in accordance therewith have rendered the issue moot, in the same sense that execution of a prisoner under a void sentence renders irrelevant the correctness vel non of that sentence.

This court has never passed upon the validity on the merits of Georgia's county unit law even in its original form, unless as Mr. Justice Clark indicates in his concurring opinion in **Baker v. Carr,** supra, the affirmance in **South v. Peters,** 329 U. S. 276, 94 L. Ed. 834 (1950), was a decision on the merits (See 7 L. Ed. 2d at 706). In two other cases, appeals attacking the law were dismissed, **Cook v. Fortson,** 329 U. S. 675, 91 L. Ed. 596 (1946); **Cox v. Peters,** 342 U. S. 936, 96 L. Ed. 697 (1952), and in another case, mandamus to require convening of a three-judge court was denied. **Hartsfield v. Sloan,** 357 U. S. 916, 2 L. Ed. 2d 1363 (1958).

However, the validity of the law was upheld on three occasions, once in **Turman v. Duckworth,** 68 F. Supp.

[9] See Opinion of the Court, Appendix A

744 (D. C. Ga. 1946), the court declaring, "our system of government, state and federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy"; a second time in **South v. Peters**, 89 F. Supp. 672 (D. C. Ga. 1950), the court declaring that "the constitution is not committed to elections by the people over the whole affected territory in which every vote will have equal weight, but rather the voting is by smaller units of unequal population and unequal voting power for each vote"; and a third time in **Cox v. Peters**, 208 Ga. 498, 67 S. E. 2d 579 (1951).

And, as held by this court in **MacDougall v. Green**, 335 U. S. 281, 284, 93 L. Ed. 3 (1948), due process and equal protection should not be used so as to deny a state the power to assure a proper diffusion of political power as between its thinly populated counties and those having concentrated masses, "in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former," and see **The Federalist**, No. 10; **Radford v. Gary**, 145 F. Supp. 541, 546 (D. C. Okl. 1956), aff'd 352 U. S. 991 (1957); **Remmey v. Smith**, 102 F. Supp. 708, 712 (D. C. Pa. 1951), app. dismissed, 342 U. S. 916 (1952); **Scholle v. Hare**, 360 Mich. 1, 104 N. W. 2d 63, 93 (1960), remanded, 30 L. W. 3332 (1962); **Dyer v. Kazuhisa Abe**, 138 F. Supp. 220, 234 (D. C. Hawaii 1956), dismissed, 256 F. 2d 728 (C. A. 9th 1958). Equal protection refers to persons, not geographical areas, and its requirements are satisfied if all persons within the given area are treated equally. **Salsburg v. Maryland**, 346 U. S. 545, 551, 98 L. Ed. 281 (1954); **McGowan v. Maryland**, 366 U. S. 420, 6 L. Ed. 2d 393 (1961).

Nor is this case similar to **Baker v. Carr**, supra, for here the State Constitution and laws were being followed in every respect, and the amendment of the law giving the

more populous counties greater voting strength refutes any assertion that plaintiff was without remedy.[10]

As to the Seventeenth Amendment, it is enough to say that assuming plaintiffs' contention to be correct as to the meaning of "by the people," it would produce the absurd result wherein candidates seeking nomination for U. S. Senator could not be nominated by the convention system in any state where the nominating process was considered an integral part of the election machinery. Cf. **United States v. Classic**, 313 U. S. 299, 85 L. Ed. 1368 (1941).

Lastly, the constitutional adjudication here was premature. If a candidate received a majority of both popular and unit votes in the first primary, he would be elected, in effect, under a popular vote basis. If a run-off primary were held, election would then be on a unit vote basis, but even then, the candidate receiving a majority of unit votes may well receive also a majority of popular votes, as has often been the case in the past. Consequently, the court erred in refusing to dismiss the complaint, for "determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial

[10] In 1917, when the county unit method was enacted into law, the 8 largest counties had about 10.4% of the unit vote, and 19.6% of the population, giving a ratio of equality of .53. After the 1962 amendment, the 8 largest counties had 24.2% of the unit vote and 41.3% of the population, giving a ratio of equality of .585—an improvement over the act as originally enacted, as to the larger counties. Under the 1962 amendment, the average population per unit vote is 7210 persons. In Fulton County, the most populous county, the population per unit vote is 13,908, a disparity of 1 to 1.93. Under the electoral college, the disparity as between California and the average for the country as a whole in 1960 was 1 to 1.47. Under the formula laid down by the court below, the constitutionality of Georgia's county unit system would vary from year to year, and what is today held void may be valid a few years hence assuming shifts in the electoral college

function." **International Longshoremen's and Warehousemen's Union v. Boyd**, 347 U. S. 222, 224, 98 L. Ed. 650 (1954).

Therefore, since the statutes here were not unconstitutional as alleged, and since in any event the controversy was not ripe for adjudication, the district court erred in granting an interlocutory injunction.

Respectfully submitted,

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EXHIBIT A.

Opinion and Decree of Court Below.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Georgia.

Civil Action No. 7872.

James O'Hear Sanders,
Plaintiff,

v.

James H. Gray, as Chairman of the Georgia State Democratic Executive Committee;
George D. Stewart, as Secretary of the Georgia State Democratic Executive Committee;
The Georgia State Democratic Executive Committee;
The Georgia State Democratic Party; and Ben W. Fortson, Jr., as Secretary of State of the State of Georgia,
Defendants.

Before Tuttle and Bell, Circuit Judges, Hooper, District Judge.

Bell, Circuit Judge:

Plaintiff seeks declaratory and injunctive relief alleging deprivation of federal constitutional rights. The prayer seeks to restrain the Georgia State Democratic Party and the Chairman and Secretary of the Georgia State Democratic Executive Committee in their representative capacities, and their successors in office, from conducting elections under the County Unit System; from tabulating and

consolidating ballots cast in the democratic primary election to be held on September 12, 1962, and in any other primary election conducted by that party on the basis of the County Unit System; from selecting any nominee on the basis of ballots cast in any primary election held on the County Unit System; from publishing or certifying the nomination of any candidate for United States Senator, Governor, Lieutenant Governor, Justice of the Supreme Court, Judge of the Court of Appeals, Secretary of State, Attorney General, Comptroller General, Commissioner of Labor, and State Treasurer on the basis of the County Unit System; and from giving force and effect to the County Unit System as it is established under the Neill Primary Act, §§ 34-3112 through 34-3218 (Ga. Code Annot. Supp.), Georgia Laws, 1917, p. 183, et seq., Ga. Laws, 1950, p. 79, et seq. The prayer is also to restrain the Secretary of State of Georgia, and his successors in office, from certifying to the several ordinaries of the State of Georgia the names of any candidates for nomination to state-wide offices who shall have been nominated in any primary held by the Democratic Party under the County Unit System; and from furnishing to the several ordinaries official ballots and election supplies whereon nomination under the County Unit System is recognized. Lastly Plaintiff seeks judgment to the effect that the Neill Primary Act is void and unconstitutional insofar as it provides for the nomination by the defendant party of any candidates for the named offices under the County Unit System.

Plaintiff is an elector within the meaning of Article II, § 1, Paragraphs I through IV of the Constitution of the State of Georgia of 1945, Ga. Code, §§ 2-701 through 2-704. He is qualified to vote in primary and general elections in Fulton County, is a member of the Democratic Party of Georgia, intends to vote in the democratic primary election to be held within the State of Georgia in 1962 and intends to support the nominess of such primary in the general

election to be held on the Tuesday after the first Monday in November, 1962.

Defendant Democratic Executive Committee, an unincorporated association, is the governing body of the defendant Democratic Party of Georgia, also an unincorporated association, and which is composed of many thousands of persons residing throughout the State of Georgia. Defendants Gray and Stewart are Chairman and Secretary, respectively, of the Executive Committee. Defendant Fortson is Secretary of State of the State of Georgia.[1]

Defendant Committee, as the governing body of defendant party, intends to supervise the holding of the primary election, to tabulate and consolidate the ballots cast therein and to certify to defendant Secretary of State the names of persons determined by that committee to have been nominated in the primary election, all as provided by the statutes of Georgia. The Secretary of State, pursuant to statute, will furnish to the several ordinaries of the State of Georgia official ballots and election supplies and will certify to the ordinaries the names of the candidates nominated in the primary. The ordinaries will in turn submit the names of the candidates to the electors of the State of Georgia for their choice in the general election in November.

Plaintiff contends in his suit that the County Unit System is arbitrary and discriminatory to the extent that it is a denial to him of equal protection of the laws within the

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[1] The facts in this memorandum opinion are to be considered as findings of fact within the meaning of Rule 52 (a), Fed. R. Civ. P., cf. *Myles v. Quinn Menhaden Fisheries, Inc.*, No. 19250, 5 Cir., 1962, ... F. 2d .... and are based on the verified pleadings, and the evidence submitted on the hearing, together with liberal use of our right to take judicial notice of matters of common knowledge and public concern. 31 C. J. S., Evidence, §§ 6-27, 32, 37, 40-43, 51, 58-61, 97, 98.

meaning of the Fourteenth Amendment to the Federal Constitution in that Fulton County where he resides, the largest county in Georgia, is alloted only six unit votes under the statute which in total allows six unit votes each for the eight largest counties by population in Georgia, four unit votes for each of the thirty next largest by population and two each for the remaining one hundred twenty-one counties. According to the 1960 United States census Fulton County had a population of 556,326 while Georgia had a total population according to the same source of 3,943,116, Fulton County thus having 14.11 percent of the total population of Georgia but only 1.46 percent of the total of 410 county unit votes. On the other hand, the least populous county in Georgia, Echols, had a population according to the 1960 census of 1876 or .05 percent of the population in the state, and is accorded two units or .48 percent of the total units. Thus the discrimination runs against Fulton County on an approximate ten to one ratio based on population and in favor of Echols County on an approximate ten to one ratio. The discriminatory ratio under the County Unit System runs, based on the 1960 census, between these ranges but in every instance against Fulton County. The Unit System also accords to the candidate receiving the plurality of votes in a county the entire unit vote thus reversing the votes of those voting for another candidate just as is the case under the Federal Electoral College System.

Plaintiff asserts, in addition to his Fourteenth Amendment claim, that the system violates the Seventeenth Amendment which provides that the Senators from each state shall be elected by the people thereof.

He alleges that he is without adequate remedy at law in view of the holding of the Supreme Court of Georgia in the case of **Cox v. Peters**, 1951, 208 Ga. 498, 67 S. E. 2d 579, appeal dismissed, 342 U. S. 936 (1952), that an action

at law for damages will not lie in favor of one aggrieved by reason of the application of the County Unit System. Jurisdiction and three-judge status is based on Title 28, U. S. C. A., §§ 1343, 2201-2202, 2281 and 42 U. S. C. A., § 1983.

History of the County Unit System.

The County Unit System throughout its long use in primary elections in Georgia, first by party rule and later by statute, has always been based on the formula obtaining for apportionment of the House of Representatives.[2] Thus we look first to the history of apportionment in the House of Representatives of Georgia. Eight counties were established under the first state constitution, 1777, from which representatives were to be elected annually by the voters; Liberty County electing fourteen representatives, Glynn and Camden one each, the other counties ten each, with the Port and Town of Savannah to have four to represent their trade and the Port and Town of Sunbury to have two to represent their trade. Glynn, Camden and all counties thereafter laid out were to have one representative provided there were ten electors in the county,

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[2] We are not aware that the statutory primary election has ever been used by any party other than the Democratic Party although it is available to all. The County Unit System is compulsory to all parties holding primary elections.

The Republican party of Georgia, although until this year it has apparently not actually nominated any one for statewide office during this century, uses the convention system for nominating for state office in presidential election years. The convention also selects a State Central Committee which has the power to nominate candidates between quadrennial conventions, which are held during presidential election years. Delegates are elected from each county at mass meetings to the state convention. The mass meeting must meet statutory requirements, Georgia Code, §§ 34-3401, 3402. The number of delegates per county to the state convention is, except for extra delegates given to counties voting Republican in the preceding election, in ratio to the number of Republican votes cast in the county in the last general election. See Gosnell and Anderson, *The Government and Administration of Georgia*, 1936, p. 37

then two representatives for thirty electors, three for forty, four for fifty, six for eighty, and ten for a hundred or more electors. After reaching a hundred electors a county would be entitled to two executive councilors among the number of representatives. These representatives were to meet and from their number select two from each county to constitute a Council and to elect a governor. The remaining representatives were to constitute the "house of assembly". Georgia Const. of 1777, Articles II-V; McElreath on the Constitution of Georgia (1911), pp. 230-231; **South v. Peters**, N. D. Ga., 1950, 89 F. Supp. 672.[3] It was under this constitution that Georgia ratified the Federal Constitution and entered the Union on January 2, 1788.

The Constitution of 1789 was then adopted. It created a general assembly consisting of a senate and house of representatives. Each county was to have one member of the Senate with terms of three years. The Members of the House were elected annually from each of the then existing eleven counties with Camden, Glynn, Effingham, Washington, Greene, and Franklin having two each, Burke, Liberty, and Richmond having four each, and Chatham and Wilkes five each, making a total of thirty-four. A governor was to be elected by the Senate each two years from three persons nominated by the House of Representatives. Georgia Constitution of 1789, Article I, §§ 1-6, Article II, § 2; McElreath, pp. 242, 243, 245; **South v. Peters**, supra.

Under the Constitution of 1798 the principle was declared that representation in the House should thereafter be according to population on an enumeration to be made each seven years, and on the basis that population of

[3] The right to vote under this Constitution was restricted to white males who owned property of a value of ten pounds, or who had a mechanic's trade and anyone who failed to vote was fined five pounds. Arts. IX, XII

3,000 would entitle a county to two members of the House, 7,000 to three members, and 12,000 or over to four members, with each county to have at least one and not more than four. Constitution of 1798, Article I, § 7; McElreath, p. 252. As was said in **South v. Peters**, this plan was an evident reflection of Article I, § 2, cl. 3 of the Federal Constitution fixing the apportionment of representatives in Congress among the states.

The governor was to be elected by the General Assembly on joint ballot, and there were popular elections only by counties. Article II, § 2; McElreath, p. 259. In 1823 the Constitution was amended to provide, beginning in 1825, that the governor should be elected each two years by persons qualified to vote for members of the General Assembly, and if no candidate had a majority of the votes the General Assembly would elect the governor by joint ballot. McElreath, p. 273.

By an amendment proposed and assented to in 1842 and confirmed in 1843, forty-seven senatorial districts were created and the number of representatives was fixed at 130, each county to have one, with no county to have more than two; the 37 counties having the greatest population were to have two each, with reapportionment to be made after each census. McElreath, p. 277. The same basis of House apportionment was carried forward, after secession, in the Georgia Confederate Constitution, Const. of 18..., Article II, § 3, par. 1; McElreath, p. 286, and in the Constitution of 1865, adopted upon the cessation of hostilities and during the Presidential Reconstruction of Georgia. Const. of 1865, Article II, § 3, par. 1; McElreath, p. 304.

The Constitution of 1868 was adopted during the second or Congressional Reconstruction and as a prerequisite to the end of the occupation of Georgia by Federal troops.*

* Save, A Constitutional History of Georgia, pp. 250-272.

It provided the three-two-one formula of apportionment in the House, which is still in use in Georgia. The House was to consist of 175 members, apportioned three each to the six largest counties, two each to the thirty-one next largest, and one each to the remaining counties. The apportionment might be changed after each federal census but the total membership was not to be increased. Constitution of 1868, Article III, § 3, par. one; McElreath, p. 327.

Fulton had the smallest population of any of the six largest counties, Chatham, Richmond, Burke, Bibb and Houston being larger in that order. They each had 1.7 percent of the House representation. Fulton had only 1.36 percent of the total population while, for example, Chatham had 2.9 percent and Richmond 2.0 percent of the population. Compendium, 9th Census of the U. S. Fulton had an equality ratio based on population of 121 percent. Stated differently, Fulton had 121 percent of the number of representatives while being entitled to 100 percent on a pure population basis. On the other hand, Chatham County had an equality ratio of only 59 percent while that of Richmond was 85 percent.

The Constitution of 1877 was next adopted and it was followed by the Constitution of 1945. The apportionment formula was changed by the Constitution of 1877 to the extent that it reduced the number of two representative counties from thirty-one to twenty-six. Changes in the total number of representatives were made from time to time because of the creation of new counties and the total was 189 at the time of the adoption of the Neill Primary Act in 1917. The situation with respect to the creation of new counties stabilized and the last county to be created in Georgia was Peach in 1924, making a total of 161 counties. Since then two counties have been abolished by merger with Fulton (Milton and Campbell) but Fulton

did not get their representation. Since 1920 the formula has been three representatives on the basis of population for the eight largest counties, two for the thirty next largest and one each for the balance. Reapportionment within the limits of the formula on population was mandatory after each Federal census and has been effected to date. The Constitution of 1877, Article III, § 3, pars. 1, 2; McElreath, p. 358.

We turn now to the history of primary elections held by the Democratic Party in Georgia. Prior to the Civil War the predominant parties in Georgia were the Democrats and Whigs. The Democrats took control when the war ended but were soon ousted by the Republicans. A Republican governor served from 1868 until the end of 1871 when the Democrats regained control to remain the dominant party at all times since then. The most serious competition to the Democrats was the Populist movement in the 1890's. This party elected five senators and forty-seven representatives to the General Assembly in 1894 and polled 44½ percent of the total vote cast. Coulter, Georgia, A Short History (1961), pp. 362-380, 392-396. See also Arnett, Populist Movement in Georgia (1922).

Dr. Saye, supra, pp. 356-358, succinctly sets out the history of party nominating methods in Georgia and the events leading up to the Neill Primary Act:

> "In the election of 1918, Governor Dorsey was unopposed for reelection. . . .
>
> "The first session of the General Assembly during Dorsey's administration passed the Neill Primary Act, destined to be of far-reaching significance in the future political history of the State. Beginning with California in 1866, several states introduced legal regulations of primary elections soon after the Civil War, but in Georgia primaries continued to be managed by political parties with little legal restraint

An act of 1887 prohibited the giving or furnishing of liquor within a certain distance of polling places on election days and gave legal recognition to the existence of primaries, and an act of 1891 prescribed several regulations, but left their use optional with the political parties. Several laws on the subject were enacted during the first decade of the twentieth century, including an act of 1904 making it a misdemeanor to buy votes and an act of 1908 requiring that primaries for the nomination of State officers be held on the same date in all counties. Yet primary elections continued to be governed largely by party custom and rules.

"Prior to 1886 diverse methods had been used to select delegates to State conventions of political parties—mass meetings in county courthouses, meetings in militia districts to select delegates to county meetings, or appointment by county executive committees. Relatively few delegates had been chosen by actual vote of the people. In that year Henry Grady, managing Gordon's campaign for Governor, effectively offset the advantage that Augustus O. Bacon held in the party organization by an appeal to the people to revolt against the politicians and elect their own delegates to the Democratic State Convention. In 1890 the State Democratic Executive Committee recommended the use of primaries in selecting delegates to the State Convention, and eight years later the Democratic Party required this procedure. Delegates from each county to the State Convention of the Party were to be chosen by the county executive committees from the friends of the gubernatorial candidate receiving the largest popular vote in the county, and they were required to vote for State officers in the convention according to the vote of the people in their county.

"The county unit rule, under which the number of votes of a county in the State Convention was determined by its representation in the House of Representatives, was used from the very beginning of primaries by the Democratic Party, except in 1908, as noted above. . . ."[5]

The movement to make statutory what had been voluntary was given additional impetus by the adoption of the Seventeenth Amendment to the Federal Constitution in 1913 requiring United States Senators to be elected by the people instead of by the state legislature as had been the practice. And with the adoption of the Primary Act, for the Democratic Party at least so long as it is used, the direct primary displaced the county mass meeting or caucus followed by the state convention as a method of choosing party candidates for the general election, and county units displaced county delegates.[6]

Based on the 1910 census, Fulton was the largest county when the Act was adopted in 1917 and the equality ratio for it under the Unit System, tied as it was to apportionment, had decreased from an advantage of 121 percent in 1868 over 100 to a disadvantage of 23.5 percent to 100.

After the primary is held, delegates are selected on the county unit basis from each county to attend the state convention where a platform is adopted, the votes can-

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[5] The main issue in the 1908 Democratic primary campaign was the effort of Hoke Smith to reform the "Undemocratic County Unit System whereby some country dwellers were given representation fifty times greater than that held by people living in large cities." The primary was held on a popular vote basis and Smith was defeated by Joseph M. Brown, who with Thomas E. Watson, supported the Unit System. Coulter, supra, p. 399.

[6] For other histories of Georgia political convention methods and the County Unit System see Coulter, supra; Gosnell and Anderson, supra; and Rigdon, Georgia's County Unit System, 1961 pp. 23-27; see also *Turman v. Duckworth*, infra, and *South v. Peters*, supra.

vassed and the names of the candidates winning the primary are ratified and certified to the Secretary of State for entry in the general election.

Under the Unit System candidates for governor and United States senator are required to receive a majority of the votes cast to secure the respective nominations out of the total of 410 county unit votes (two for each member of the House of Representatives). In the event of a tie the candidate with the largest popular vote becomes the nominee. A second or run off primary is held if no candidate has the majority. A plurality is sufficient as to the other offices to which the County Unit System applies.

The County Unit System as embraced in the Neill Primary Act is statutory only and a concerted effort was made in 1950 and again in 1952 to amend the Constitution to include it. The amendment was defeated in the 1950 general election on a popular vote basis 164,377 to 134,290, but the amendment would have carried 230 to 183 on a county unit basis. There were 309,170 votes against it and 279,882 for it in 1952 but the county unit vote would have been 264 votes for and 146 against. Rigdon, supra, pp. 36, 39.

Previous Litigation Concerning the County Unit System.

The validity of the County Unit System was first challenged in the case of **Cook v. Fortson**, N. D. Ga., 1946, 68 F. Supp. 624, where an effort was made to have the county unit rule and the statutes permitting its use declared unconstitutional, and to enjoin its use in determining the democratic nominee for Congress for the Fifth District of Georgia. The winner received a majority of the county unit vote but another candidate received a majority of the popular vote. Injunctive relief was denied

on the basis of **Colegrove v. Green**, 1946, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed 1432, leaving the inequality complained of for consideration by the State Legislature or by the Congress under Article I, § 4 of the Federal Constitution. The court doubted that the county unit rule could be said to be imposed on a congressional primary by the state at all so as to bring the Fourteenth Amendment into operation since the statute, § 34-3217, provides that it shall not be construed to require any definite unit of election of candidates for primary nomination for Congress. If imposed it is done by action of the Democratic Committee for the Congressional District and not by statute, and this was expressly stated in the state party rules. The court said that at any rate the State Democratic Executive Committee had in effect cancelled the primary by certifying both candidates to the Secretary of State for inclusion on the general election ballot where all Democrats would be free to vote their choice on a popular vote basis.

In **Turman v. Duckworth**, N. D. Ga., 1946, 68 F. Supp. 744, plaintiffs challenged the use of the County Unit System in the statewide gubernatorial primary. One candidate received a plurality of the popular vote but the winner received a majority of the unit votes. An interlocutory injunction was denied. The court noted that plaintiff had not moved to assert the invalidity of the unit system before the Executive Committee set the primary, and before it was too late to have another primary or even a convention nomination. The court stated that the power and duty of the court to act is plain where a criminal statute about a political matter is involved. **In Re Yarbrough**, 1884, 110 U. S. 651, 45 S. Ct. 152, 28 L. Ed. 274, and **United States v. Classic**, 1941, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, or where there is involved a statutory right of action for damages, as in **Nixon v. Herndon**, 1927, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759; **Smith**

v. Allwright, 1944, 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987, and **King v. Chapman**, 5 Cir., 1946, 154 F. 2d 460, but denied relief on the basis of **Colegrove**, supra. The court then made an additional statement for use in considering the merits in the event of appeal, and held that it had not been shown that the State of Georgia had deprived plaintiffs of the equal protection of the laws, recognizing however the primary as state action within the meaning of the Fourteenth Amendment. **King v. Chapman**, supra. It was pointed out that neither the state nor federal government had ever sought or demanded that voters should have equal voting influence, referring to the electoral college under which there have been presidents who did not receive a majority of the popular votes, and to the fact that the great political parties in their state and national organizations have based representation in the nominating conventions on the legislative strength of the states or counties represented. The court recognized the inequality between the less populated counties and Fulton County in representation in the legislature, and by consequence in applying the county unit rule to a primary, but stated that the remedy was through changes in the law rather than by appeals to courts of equity. It is a fair statement to say that the *ratio decidendi* of this case, like **Cook** is that the decision of the court was controlled by the **Colegrove** case involving congressional reapportionment in Illinois.

Both the **Cook** case and the **Turman** case were dismissed on appeal to the Supreme Court, with the authority cited being a case on mootness. Justices Black and Murphy were of the opinion that probable jurisdiction should be noted, with Justice Rutledge being of the opinion that the question of jurisdiction should be postponed until a hearing on the merits. 329 U. S. 675, 1945, 67 S. Ct. 21, 91 L. Ed. 596 (October 28, 1946).

Another suit was instituted in 1950, this time prior to the primary, challenging the unit system and it was dismissed by the District Court. **South v. Peters**, 89 F. Supp. 672 (N. D. Ga., 1950), Judge Andrews dissenting. The Supreme Court affirmed per curiam, saying "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions," citing **MacDougall v. Green**, 1948, 335 U. S. 281, 69 S. Ct. 1, 93 L. Ed. 31; **Colegrove**, supra; **Wood v. Brown**, 1932, 287 U. S. 1, 53 S. Ct. 1, 77 L. Ed. 313; and **Johnson v. Stevenson**, 5 Cir., 1948, 170 F. 2d 108. **South v. Peters**, 1950, 339 U. S. 276, 70 S. Ct. 641, 94 L. Ed. 834. Justices Douglas and Black dissented from the dismissal on the grounds that the right to vote in a primary where the discrimination is based on race, creed or color was held in **Nixon v. Herndon**, supra, to be covered by the equal protection clause of the Fourteenth Amendment, and the right to vote under such circumstances is protected by the Fifteenth Amendment. **Smith v. Allwright**, supra, and **United States v. Classic**, supra. They thought the evidence regarding the County Unit System indicated equally invidious discrimination. The County Unit System would fall under the equal protection clause, and by reason of violating Article I, § 2 of the Constitution providing that members of the House of Representatives shall be chosen by the people (not here involved) and the Seventeenth Amendment providing that senators shall be elected by the people. They set out their view of what the rule should be and it turned out to be the forerunner of things to come, **Baker v. Carr**, Supreme Court, No. 6, October Term, 1961 (decided March 26, 1962). It was that "the only tenable premise under the Fourteenth, Fifteenth, and Seventeenth Amendments is that where nominations are made in primary elections, there shall be no inequality in voting power by reason of race, creed, color or other invidious discrimination."

In **Cox v. Peters**, supra, suit was brought for damages under 8 U. S. C. A., § 43 against Georgia election officials alleging that a voter in the 1950 gubernatorial primary had been denied full enjoyment of his right to vote by reason of the County Unit System. The Georgia Supreme Court affirmed a dismissal of the suit, saying that the right to vote in a gubernatorial primary was not derived from the United States Constitution, and that the Georgia constitutional and statutory provisions asserted were applicable only to elections and that the primary was not the equivalent of an election, but only a substitute for a party convention. The United States Supreme Court dismissed for want of a substantial federal question, Justices Black and Douglas dissenting. Cox v. Peters, 1952, 342 U. S. 936, 72 S. Ct. 557, 96 L. Ed. 697.

A fourth attempt failed in 1958 when plaintiff was unsuccessful in obtaining the appointment of a three-judge court to consider the question. Hartsfield v. Sloan, leave to file petition for writ of mandamus, denied, five to four, 357 U. S. 916 (1958).[7]

Jurisdiction, Justiciability, Standing and the Question Presented.

A calm in litigation ensued thereafter as to the County Unit System while so-called reapportionment litigation was taking place in other states and some at least was pending before the Supreme Court. Baker v. Carr, supra. The instant litigation was filed shortly after the announcement of the decision in that case, and on the same day. A three-judge court was duly constituted and the matter came on promptly for hearing on the application for interlocutory injunction.

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[7] What has been heretofore stated was prepared before the hearing and before the General Assembly amended the Neill Primary Act, as will be hereinafter discussed. This was done in order to expedite a decision in a matter of such public importance.

That case involved the apportionment of the Tennessee State Legislature. The court held that the District Court possessed jurisdiction of the subject matter, and that a justiciable cause of action was stated upon which the appellants, residents and voters of Tennessee claiming arbitrary and capricious state action offensive to the Fourteenth Amendment, had standing to maintain the suit. The rationale of that decision encompasses the cause of action here. We, accordingly, take jurisdiction and also hold that plaintiff has standing to maintain the suit and that the complaint sets out a justiciable issue.

In doing so, we, of course, resolve in favor of the plaintiff the question whether the Fourteenth Amendment protection extends to alleged deprivation of equal protection occurring in a Primary, as distinguished from a General election.

Much has been said in briefs and oral argument as to the place which the Primary in the State of Georgia has traditionally played in the election process. It is a fact known to all that the Democratic candidate has, without exception, at least during the present century, been the choice of the voters at the General election. On the other hand, it is pointed out that at least with respect to the office of Governor, a candidate has been nominated by the Republican party to participate in the General election in November of this year. Our conclusion that the protection of the Fourteenth Amendment extends to invidious discriminations if they exist in a party primary in Georgia in no way depends upon the degree to which the Democratic party primary is tantamount to the final election. It is based rather on prior decisions of the Court of Appeals for the Fifth Circuit, where it has been held that the conduct of a Primary election in Georgia is such an essential part in the total election process, its conduct and management is so closely supervised by State law

and the effect to be given it is so clearly determined by statute that the action of the party in the conduct of its primary constitutes state action within the contemplation of the Fourteenth Amendment to the Constitution (Chapman v. King, 5 Cir., 154 F. 2d 460).[8] Touching on this matter Judge Sibley's opinion said:

"We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part,

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[8] As pointed out in the opinion written by Judge Sibley for the Court in Chapman v. King, supra:

". . . The State collaborates in these ways: It prohibits anyone to participate in any primary or convention of any political party who is not a qualified voter. Georgia Code, § 2-608. Constitution, Art. II [since repealed] Sec. I, Par. 8. The State furnishes its list of registered voters and these voters alone are declared entitled to vote in primaries as well as in general elections. Georgia Code, § 34-405. And the State registrars are required to be at the court house during the voting hours of the primary as fixed by law § 34-2001a, to make corrections in the list [since repealed] § 34-411 (Supplement). The State requires the party to select election managers, and requires each manager to take an oath that he will fairly and impartially and honestly conduct the election according to the provisions of law. § 34-3201. If a voter is challenged, they are required to administer to him an oath that he is duly qualified to vote 'according to the rules of the party, and according to the election laws of this State.' § 34-3202. All the laws in reference to the qualification of voters and their registration are applied to primaries, and 'No person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election.' § 34-3218. If the challenged voter swears falsely, the State will punish him. § 34-9925. No one but a sworn manager can have any part in receiving or counting the votes. § 34-3205. The managers must turn over tally sheets, lists of voters, ballots and other election papers to the Clerk of the Superior Court to be kept under seal until the next grand jury meets if no contest is filed. § 34-3207. The managers are indictable for violation of their duty. §§ 34-9922, 34-9923. Generally all penal laws touching elections are extended to primaries, § 34-9933, Supplement; and § 34-9907."

of the public election machinery." Chapman v. King, supra, p. 464.

See also Smith v. Allwright, 321 U. S. 649, and United States v. Classic, 313 U. S. 299.

The remaining questions presented are but two: Does the County Unit System as set out in the Neill Primary Act, amended, violate the right of plaintiff to equal protection of the laws under the Fourteenth Amendment or his right to vote for a United States senator under the Seventeenth Amendment. This latter right would reach the unit system only as to the primary election for the office of United States senator, while the former would reach it as to all statewide offices. A subsidiary question of prime, even overriding importance, is the test to be applied to determine violation, and the factors to be considered in making the test.

The Test to Be Applied.

It must be borne in mind that the hearing just held is a hearing for a temporary injunction. Such a hearing differs very largely from a final hearing in equity on the merits of a case in that a plaintiff may be entitled to immediate relief where time is of the essence of the controversy, even before the parties are able to fully develop their case on the merits or before the trial court is able adequately to consider and make the proper judicial determination of all of the legal questions that arise. This case is an excellent illustration of the need for distinguishing between temporary and permanent relief. We do not doubt that the Fourteenth Amendment applies; and we proceed on that basis. We think the Court by its opinion in **Baker v. Carr** has now adopted the following test stated by Mr. Justice Douglas in **South v. Peters**, supra:

"Where nominations are made in primary elections, there shall be no inequality in voting power by reason

of race, creed, color, or other invidious discrimination.'"[9]

Having applied the equal protection clause of the Fourteenth Amendment to the rights of plaintiff in this suit, and having set aside for the purpose of this hearing and decision the other points raised by all parties, we apply the test of invidious discrimination. We need not apply it of course to the "time honored" system but to the system which is new as of yesterday. And as a part of the application of the test we hold that a political party may use a county unit system in primary elections for the nomination of candidates in the general election if the system, as we shall point out, does not run afoul of constitutional inhibitions.

A test for invidiousness must be formulated. Unlike per se invidiousness, springing from discrimination based on race, creed or color, we must here deal with discrimination not so infected, but arising out of a state legislative classification diffusing party political strength. The diffusion is between counties of all sizes, sparsely to densely populated, apparently on a rural-urban basis, but weighted from top to bottom, county by county, in favor of the next smaller.

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[9] Webster's International Dictionary gives the following definition for "invidious":

"1. Tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating; as invidious distinctions."

The same dictionary gives the following definition for "discrimination":

"1. Act of discriminating, or state of being discriminated."

Referring to the definition of "discriminate" in the same dictionary, we find the following definition:

"1. Having the difference marked, distinguished by certain tokens; distinct."

We make the test on a consideration of all relevant factors, and these include rationality of state policy. See the concurring opinion of Mr. Justice Clark in **Baker v. Carr** where the dismissal of the appeal in **South v. Peters**, supra, was said to reflect the viewpoint of the Supreme Court "to refrain from intervening where there is some rational policy behind the State's system."

Another test is whether or not the system is arbitrary. The right of plaintiff in this connection depends upon the treatment accorded his unit. His unit, Fulton County, must be related to the state as a whole in measuring his right, and his right is the same as that of all other Democrats in his unit. The fact that Echols or some other small county receives more than its share is of no concern to Fulton County so long as it is accorded proper treatment. And the consideration of this factor includes the applicability of the diffusion principle—the right of a state to properly diffuse "political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for asserting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demand on the states." **MacDougall v. Green**, supra, at page 284. We have considered too the genesis of the System, whether or not it was for a fair purpose in the beginning—that it was is self-evident from the history heretofore set out.

Another important factor to be considered in making the test is whether or not the unit system has a historical basis in our political institutions, both federal and state. The primary in Georgia and elsewhere simply took the place of the convention. The county units took the place of county delegates. Counties were governmental units in Georgia before the Union and had their voice in the councils of government on the state level through representa-

tion, rationally apportioned, first on number of electors and later on population, but never in any exact proportion. And for many years governors were elected by these representatives. With the advent of popular elections of the governor and other state officials, conventions with delegate strength by party rule based on county apportionment in the House of Representatives became the medium of nomination. Delegates were elected, not by direct primary, but at county mass meetings. This was followed by the county primary for the election of delegates—still in the ratio of legislative apportionment, and later by statewide primaries but still by party rule. And this finally became the statutory mode—as in the statute under attack here.

The national conventions of the great political parties use the congressional apportionment formula to a large extent in arriving at delegate strength. This gives some of the smaller states an advantage over the larger states and other factors, for example—the extra delegate bonus for party loyalty in past elections—cause a variance from exact apportionment.

The electoral college is not in exact proportion to population or voting strength but gives an advantage to the smaller over the larger. Recognizing that the electoral college was set up as a compromise to enable the formation of the Union among the several sovereign states, it still could hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious. See Wilmerding, The Electoral College (1958), for examples of inequities arising under that system. And at least one other state, Maryland, uses a County Unit System in primary elections. Rigdon, supra, pp. 70-73.

Another important consideration in making the test at least for the purpose of court intervention, is the presence

or absence of political remedy. This lack is implicit in **Baker v. Carr.** Here we are not dealing with legislative apportionment but with the management of the state Democratic Party. Plaintiff as a Democrat is complaining of treatment received by him at the hand of other Democrats through the medium of a state statute, sponsored by a governor from his party and enacted by a legislature consisting in the main of members of his party. A political remedy encompasses the give and take within the political arena, but we must consider it, and whether there is substantial likelihood under the existing system of plaintiff's obtaining such relief measures as may be needed to accord him his constitutional rights. We hold that there is not.

An additional factor of importance, and of which we are much aware, is the delicate relationship between the federal and state governments under the Constitution. It has long been the law that the violation in question must be clear before a federal court of equity will lend its power to the disruption of the state election processes.

The test is on the sum of all of these factors, and if the action—here the statute, complained of—offends what are thought to be fundamental political concepts, giving due regard to each factor and to the rights of plaintiff and all others in his suit as compared to the whole—the state, it must be stricken because of discrimination so excessive as to be invidious.

The Merits.

The system as it existed prior to yesterday was violative of the right of plaintiff to equal protection of the laws. The system as it exists today is an improvement, and is the result of an effort on the part of the responsible state officials and the General Assembly of Georgia within recent days to comport with sharp new legal precedents. But

even the new system misses the mark in two respects: first in failing to accord the unit of plaintiff a reasonable proportion of the whole, and second in failing to accord the units representing a majority of the population a reasonable proportion of the whole. We do not strike the county unit system as such. We do strike it in its present form.[10]

And while it may appear doctrinaire to some extent in the application of such broad constitutional rights as equal protection, **MacDougall**, supra, to state definite standards, we nevertheless, because, and only because, it is a question of much public moment, hold that a unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the whole vote for electors of the party in a recent presidential elec-

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[10] The following table will illustrate how under the recent statute the vote of each citizen counts for less and less as the population of the county of his residence increases; this table covering only the four largest and four smallest counties in comparison with Fulton, the largest:

County Number	Name	Population	Number Unit Votes	Population per unit vote	Ratio to Fulton County
1	Fulton	556,326	40	13,908	
2	DeKalb	256,782	20	12,839	
3	Chatham	188,299	16	11,760	
4	Muscogee	158,623	14	11,330	
156	Webster	3,247	2	1,623	8 to 1
157	Glascock	2,672	2	1,336	10 to 1
158	Quitman	2,432	2	1,216	11 to 1
159	Echols	1,876	2	938	14 to 1

There are 97 two-unit counties, totalling 194 unit votes, and 22 counties totalling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives counties having population of one-third of the total in the state a clear majority of county units.

tion; provided no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once each ten years. This is a "judicially manageable standard" contemplated in **Baker v. Carr**, supra.

Due consideration has been given to delaying the entry of an injunction until the next regular session of the General Assembly in January but having recognized the constitutional right of plaintiff, we cannot fail to protect it, nor do we believe the state would want to deny it in the fall primary.

An interlocutory injunction will be entered enjoining and restraining defendants from giving application to the County Unit System by statute or party rule in any election where the allocation of units falls short of this standard.

This 28th day of April, 1962.

Elbert P. Tuttle,
Elbert P. Tuttle,
Circuit Judge.

Griffin B. Bell,
Griffin B. Bell,
Circuit Judge

Frank A. Hooper,
Frank A. Hooper,
District Judge.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Georgia.

Civil Action No. 7872.

James O'Hear Sanders,
Plaintiff,

v.

James H. Gray, as Chairman of the Georgia State Democratic Executive Committee;
George D. Stewart, as Secretary of the Georgia State Democratic Executive Committee;
The Georgia State Democratic Executive Committee;
The Georgia State Democratic Party; and Ben W. Fortson, Jr., as Secretary of State of the State of Georgia,
Defendants.

Order.

The defendants, their agents, employees, successors and all persons in concert with them, are hereby enjoined until the further order of this Court from conducting any party primary election or giving effect to any party primary election so far as controls the counting of votes under a county unit system in compliance with the terms of the Neill Primary Act, as amended on April 27, 1962, by the General Assembly of the State of Georgia, or according to any county unit method of counting votes, whether by virtue of statute or party rule, where the allocation of units violates the standards of allocation set forth in the opinion of the Court entered this date, to-wit: A county unit system for use in a party primary is invidiously discrimi-

natory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the vote for electors of the party in the most recent presidential election; provided, no discrimination is deemed to be invidious under such system if the disparity against any county is not in excess of the disparity that exists as against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress of the United States, and, provided provision is made for allocations to be adjusted to accord with changes in the basis at least once each ten years.

This April 28, 1962.

Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

Frank A. Hooper,
Frank A. Hooper,
United States District Judge.

APPENDIX B.

Georgia Statutes in Question.

Ga. Code Ann., § 34-3212. **County Unit Vote.** (a) Whenever any political party in this state shall hold a primary election for nomination of candidates for United States Senator, Governor, Lieutenant Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day each year in which there is a regular general election, on such day as now or hereafter may be prescribed by law. Candidates for nominations to the above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis as more fully hereinafter set forth.

(b) County unit votes shall be allocated among the several counties of this State in accordance with the following bracket system.

Population of County	Unit Votes
0- 15,000	2
15,001- 20,000	3
20,001- 30,000	4
30,001- 45,000	5
45,001- 60,000	6
60,001- 90,000	8
90,001-120,000	10
120,001-150,000	12
150,001-180,000	14
180,001-210,000	16
210,001-240,000	18
240,001-270,000	20
270,001-300,000	22
300,001-330,000	24
330,001-360,000	26
360,001-390,000	28
390,001-420,000	30
420,001-450,000	32
450,001-480,000	34
480,001-510,000	36
510,001-540,000	38
540,001-570,000	40
570,001-600,000	42
600,001-630,000	44
630,001-660,000	46
660,001-690,000	48
690,001-720,000	50

and for each 30,000 population in excess of 720,000 said county shall be entitled to an additional (2) unit votes.

The county unit votes hereinbefore allocated shall be allocated according to the latest federal decennial census, or any future federal decennial census as officially published from time to time.

(c) If in any county any two or more candidates should tie for the highest number of popular votes received, the

county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published at least one time in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire State, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for the above named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear, after the consolidation of all the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have received a majority of the popular votes shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and provided, however (except as hereinabove provided in case of a tie

in unit votes) no political party holding a statewide primary for the nomination of candidates named in this Section, as amended, shall declare any candidates for any such office the nominee of said party for such office unless such candidate shall have received in the primary a majority of all the county unit votes as hereinbefore provided for, and also a majority of all the popular votes cast in such primary. If no such candidate shall receive a majority of the county unit votes and also a majority of the popular votes cast in such primary, there shall be a second primary election for such office held in the manner provided in Section 34-3213, as amended, between the candidate receiving the greatest number of county unit votes and the candidate receiving the greatest number of popular votes, but if the candidate receiving the greatest number of county unit votes also received the greatest number of popular votes, then the run-off shall be held between the candidate receiving the greatest number of county unit votes and the candidate receiving the next greatest number of popular votes. The results of such run-off primary election shall be determined and given effect as provided in said Section 34-3213, as amended.

(d) It shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate is placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts 1917, pp. 183, 184; 1950, pp. 79, 80; 1962, Ex. Sess., p.).

Ga. Code Ann., § 34-3213, **Second Primary Election.** In the event that a run-off primary is required as provided in Section 34-3212, as amended, such political party shall hold a second primary throughout the State on a day fixed by the State Executive Committee of the political party holding such primary, and such run-off primary shall be held between the condidates as provided in Code Section 34-3212, as amended. The vote in such run-off primary shall be consolidated and the result declared and certified within 10 days after said second primary election, and published at least one time in a newspaper published at the Capital within three days after the completion of such consolidation, certified under the hands and seals of said chairman or secretary, and the candidate who shall receive a majority of the county unit votes throughout the State shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for the particular office for which he is a candidate; and it shall be the duty of the State Executive Committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held to be the duly nominated candidates of such party for the office named: Provided, that if both candidates for any office in said second primary election shall receive an equal number of county unit votes, after the consolidation of all the county unit votes of all the counties, then said State convention or the permanent chairman thereof, or the Secretary thereof, or other authority of such party, shall declare the candidate receiving the majority of the popular votes cast the reg-

ular nominee of such party for that particular office: Provided, further that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts 1917, pp. 183, 185; 1950, pp. 79, 82; 1962 Ex. Sess., pp. . . . .).

Ga. Code Ann., § 34-3214. **Convention, when held.** In each regular election year in which a second primary shall be necessary, by reason of a failure of a candidate or candidates to receive a majority of the county unit votes at the first primary election, such party or its authority shall not hold its convention until after the expiration of 15 days from the date of such second primary election (Acts 1917, p. 188).

Ga. Code Ann., § 34-3215. **Special primary elections to fill vacancies.** Special primary elections to fill vacancies in any of the offices referred to in this law shall be held on such date as may be fixed by the State executive committee of such party; but the same rules prescribed in this law for determining the result in general primary elections for the offices named shall govern in determining the result of any special primary election; and a second primary election shall be held within 15 days after the date of such first primary election, in the event no candidate receives a majority of all of the county unit votes throughout the State; and the same duties and obligations are hereby imposed upon the chairman, secretary, convention or other party authorities in the case of such special primary elections as are in this law imposed upon them in the case of general primary election: Provided, that if no convention of such party shall be called or held, to follow a special primary election, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts, 1917, p. 188).

Ga. Code Ann., § 34-3215.1. **Certificate of result of election.** Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State committee of the political party holding such primary. Said certificate shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election (Acts 1943, p. 347).

Ga. Code Ann., § 34-3217. **Limitations.** Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals (Acts 1917, p. 189).

Ga. Code Ann., § 34-3218. **Laws of force.** All the laws in reference to the qualification of voters and their registration shall apply to said elections, and no person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election (Acts 1917, p. 189).